No. 80-1566

APR 16 1981

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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
PETITIONER,

VS.

GILBERT EWALD, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a claimant residing in a Deferral State under ADEA have available to him the extended 300 day period for notification to sue to the Secretary of Labor as long as that claimant initiates state proceedings, regardless of whether those state proceedings are timely?

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STATEMENT OF CASE

Respondent had worked for the Great Atlantic & Pacific Tea Company between the years 1952 and April 21st, 1975 when he was terminated. Respondent notified the Department of Labor on January 26th, 1976 that he intended to file a civil action under the ADEA. He thereafter filed a complaint with the Michigan Civil Rights Commission pursuant to Michigan Compiled Laws Annotated, Section 423.303.

Respondent was notified on June 21st, 1976 by the Department of Labor that conciliatory action on their behalf had been unsuccessful and that he was free to bring a civil action against Petitioner under ADEA. A civil action was filed on August 19th, 1976 in the United States District Court for the Eastern District of Michigan, Northern Division, alleging age discrimination in violation of the ADEA. The District Court, prior to Respondent obtaining any discovery from Petitioner entered an order and opinion dated July 27th, 1977 granting Respondent's Motion for Summary Judgment holding the Respondent had not complied with the Notice requirements of ADEA.

It should be noted that a period of approximately four years and eight months has passed since Respondent initially filed his action for relief with the United States District Court for the Eastern District of Michigan, Northern Division. It has been approximately six years since Respondent was discharged from Petitioner Great Atlantic & Pacific Tea Company. The Complaint filed with the District Court has requested relief from alleged discriminatory practices of Petitioner. This matter has been before the Court of Appeals for the Sixth Circuit on two occasions and now is before the United States Supreme Court on a second occasion.

SUMMARY OF ARGUMENT

Petitioner presumes that this Court expected the Court of Appeals for the Sixth Circuit to go far beyond the decision in *Mohasco* v. *Silver*, 48 U.S.L.W. 4851 (June 29th, 1980) and to entertain extensive Briefs regarding the issue of whether or not the Respondent is entitled to the expanded 300 day filing period although this Court vacated the Sixth Circuit's previous Judgment with costs to Petitioner and although this Court instructed the Sixth Circuit Court of Appeals to consider the case in light of this Court's decision in *Mohasco*. Such a presumption is contrary to the obvious intent of this Court in *Mohasco*.

Petitioners further suggest that since *Mohasco* dealt with a Title VII case and not an ADEA case, the decision had no affect on interpretation of filing requirements under ADEA. This also is contrary to previous decisions of the Court. *Oscar Mayer & Co.* v. *Evans*, 99 S. Ct. 2066 (1979).

The suggestion that the decision of the Court of Appeals is against the structure policy and history of ADEA is in fact at odds with the prior decision of this Court as this Court has convincingly held in *Mohasco* that the legislation provides for a 300 day filing period in a state that has a law prohibiting age discrimination in employment and that the Act does not require that State proceedings must be filed within the time limit specified by State law.

ARGUMENT

I.

The Court of Appeals For The Sixth Circuit Did Fully Reconsider The Issues As Presented As Intended By This Court's Remand Order of October 20th, 1980

Although the Court of Appeals for the Sixth Circuit did not require and receive further briefing of the issues it should be

noted that they had the opportunity of extensive briefing of the issues prior to the Court's remand order based on *Mohasco Corporation* v. *Silver, supra* and they further had the benefit of the Court's well reasoned decision in *Mohasco*. Petitioner suggests that the Court of Appeals did not consider the legislative history of ADEA although the failure of the Court to specifically comment on that does not preclude an assumption that they considered all issues involved. The Petitioners make expansive presumptions in their argument which are totally unsupported by the record. The Court of Appeals is not required to explain in minute detail the reasons and grounds for their decision as long as their decision is supported by the record and is supported by the applicable law. Respondent argues that such conditions are certainly satisfied in the case at hand.

II.

The Lower Court Has Not Expanded The Interpretation of *Mohasco Corporation* v. *Silver* Beyond What Was Intended By This Court And Therefore No Clarification Is Necessary.

Petitioner argues that since *Mohasco* was not an ADEA case at all that a treatment of the notice requirements under the two pieces of legislation must be different. This Court has previously held in *Oscar Mayer Company* v. *Evans*, 99 S. Ct. 2066, 2071 (1979) that the interpretation of the notice requirements under ADEA and Title VII is identical. While the notice requirements are indentical there is a distinguishing feature in that there is no period of exclusive jurisdiction for the state to proceed under ADEA. All that is required under ADEA is that the State be allowed 60 days in which to act before civil litigation is commenced with the United States District Court. [See 29 U.S.C. Sec. 633(b).] Such a distinction though, does not preclude an interpretation of the time

periods for notification as being identical. Respondents would suggest that the logic in this Court's decision in *Mohasco & Oscar Mayer Company* was that this Court declined to preempt the legislative power of Congress by reading something into the notice requirements that just is not present.

Petitioners also cite the case of *Delaware State College* v. *Ricks*, __U.S.__, 101 S. Ct. 498 (1980) for the proposition that the issue has not been decided. While Petitioners object to the Court of Appeals relying on so-called dicta in the *Mohasco* case, they are themselves relying upon certain statements made in the *Ricks* case which they feel may indicate that the issue has not been decided. Respondent would argue that such a presumption goes far beyond the holding of this Court in *Ricks*, and supposes an illusory issue.

It appears as though Petitioner is requesting this Court to determine the factual issues regarding compliance with Notice requirements on a case by case basis despite the fact this Court has already set forth in its previous decisions the guidelines which should be applicable.

III.

The Holding Of The Court Of Appeals On Remand Is In Line With The Decision Of This Court And With The Structure, Policy And Legislative History of ADEA.

The Petitioner argues that the structure, policy and legislative history of ADEA is such that Respondents should not be entitled to the longer filing period and further argues that this has been the interpretation given by the Courts of Appeals in previous cases. They cite principally *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980); *Davis* v. *Calgon Corp.*, __F.2d__, 22 BNA FEP cases 1761 (3rd Cir. 1980); and the case at hand. What Petitioners failed to note though,

was that the policy, structure and history of ADEA has been set forth and argued in each of these Courts and that while the Courts of Appeals appear to have reached similar conclusions they were not always fully convinced of the correctness of their decision. In fact in the case at hand the original opinion issued in the Court of Appeals had a dissenting opinion by Circuit Judge Jones. Circuit Judge Jones felt that the legislative history of ADEA was silent on the question that was before that Court and is now before this Court.

The State in this case was allowed to perform its function, the Department of Labor was allowed to perform its function and the Defendant was not presented with a stale claim. Under all of the circumstances it appears that the policy of the ADEA has been clearly met. The statute is remedial and as such requires the type of interpretation that has been previously given by this Court.

It should further be noted that this Court in *Calgon Corporation* v. *Lawrence E. Davis*, File No. 80-529, the case cited by Petitioners in their Brief, denied a Petitioner for Rehearing on the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit. The issue in that case was identical to the issue in this case and in fact the counsel representing the Petitioner in that case are from the firm that represents the Petitioner in the case at hand.

As the Statement of Facts point out, justice for Mr. Ewald has at this point been delayed for a period of approximately six years from the date of the alleged discriminatory act and for a period of approximately four years and eight months since suit was filed with the District Court. Respondent questions whether the delays and the costs that he's been forced to incur are necessary in light of decisions that clearly appear to be correct.

CONCLUSION

The Circuit Court's decision denying a Rehearing and interpreting this Court's decision in *Mohasco* as providing for an extended filing period is correct and that Petitioner for Writ of Certiorari should be denied.

Respectfully submitted,

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